

EDEN



Eden Environmental Citizen's Group, LLC

October 1, 2019

Via US Mail, Certified USPS Tracking No. 9407 1118 9956 1926 1917 11

Adrian Moye, CEO
Vincent Arroyo Winery, Inc.
2361 Greenwood Avenue
Calistoga, CA 94515

Via US Mail

Matthew Moye
Agent for Service
Vincent Arroyo Winery
1026 Hardman Avenue
Napa, CA 94588

**Re: FIRST SUPPLEMENTAL 60-Day Notice of Violations and Intent to File
Suit Under the Federal Water Pollution Control Act
("Clean Water Act")**

To Officers, Directors, Operators, Property Owners and/or Facility Managers of Vincent Arroyo Winery, Inc.:

I am writing on behalf of Eden Environmental Citizen's Group ("EDEN") to give legal notice that EDEN intends to file a civil action against Adrian Moye, Matthew Moye and Vincent Arroyo Winery, Inc. ("Discharger") for violations of the Federal Clean Water Act ("CWA" or "Act") 33 U.S.C. § 1251 *et seq.*, that EDEN believes are occurring at the Vincent Arroyo Winery, Inc. facility located at 2361 Greenwood Avenue in Calistoga, California ("the Facility" or "the site").

This letter supplements the prior Notice Letter in this matter, issued on August 19, 2019.

2151 Salvio Street #A2-319
Telephone: 925-732-0960
Website:

Concord, CA 94520



Email: edenenvcitizens@gmail.com

edenenvironmental.org

EDEN is an environmental citizen's group established under the laws of the State of California to protect, enhance, and assist in the restoration of all rivers, creeks, streams, wetlands, vernal pools, and tributaries of California, for the benefit of its ecosystems and communities.

CWA section 505(b) requires that sixty (60) days prior to the initiation of a civil action under CWA section 505(a), a citizen must give notice of intent to file suit. 33 U.S.C. § 1365(b) Notice must be given to the alleged violator, the U.S. Environmental Protection Agency ("EPA"), and the State in which the violations occur.

As required by CWA section 505(b), this Notice of Violation and Intent to File Suit provides notice to the Discharger of the violations which have occurred and continue to occur at the Facility. After the expiration of sixty (60) days from the date of this Notice of Violation and Intent to File Suit, EDEN intends to file suit in federal court against the Discharger under CWA section 505(a) for the violations described more fully below.

I. THE SPECIFIC STANDARD, LIMITATION, OR ORDER VIOLATED

EDEN's investigation of the Facility has uncovered significant, ongoing, and continuous violations of the CWA and the General Industrial Storm Water Permit issued by the State of California (NPDES General Permit No. CAS000001 [State Water Resources Control Board ("SWRCB")] Water Quality Order No. 92-12-DWQ, as amended by Order No. 97-03-DWQ ("1997 Permit") and by Order No. 2014-0057-DWQ ("2015 Permit") (collectively, the "General Permit").

Information available to EDEN, including documents obtained from California EPA's online Storm Water Multiple Application and Reporting Tracking System ("SMARTS") indicates that on August 28, 2019, Vincent Arroyo Winery, Inc. submitted an application for No Exposure Certification ("NEC") and received an automatically generated NEC ID Number of 28NEC005444 on September 4, 2019.

As more fully described in Section III, below, EDEN alleges that in its operations of the Facility, the Discharger has committed ongoing violations of the substantive and procedural requirements of the Federal Clean Water Act, California Water Code §13377; the General Permit, the Regional Water Board Basin Plan, the California Toxics Rule (CTR) 40 C.F.R. § 131.38, and California Code of Regulations, Title 22, § 64431.

II. THE LOCATION OF THE ALLEGED VIOLATIONS

A. The Facility

The location of the point sources from which the pollutants identified in this Notice are discharged in violation of the CWA is Vincent Arroyo Winery, Inc.'s permanent facility address of 2361 Greenwood Avenue in Calistoga, California.

Vincent Arroyo Winery, Inc. produces Wine at its Facility. Facility Operations are covered under Standard Industrial Classification Code (SIC) 2084.

Based on EPA's Industrial Storm water Fact Sheet for Sector U – Food and Kindred Products Facilities, polluted discharges from food plants such as the Facility contain pH affecting substances; total suspended solids ("TSS"); Biochemical Oxygen Demand ("BOD"), gasoline and diesel fuels; miscellaneous insecticides, rodenticides, pesticides; and oil and grease ("O&G"). Many of these pollutants are on the list of chemicals published by the State of California as known to cause cancer, birth defects, and/or developmental or reproductive harm.

Information available to EDEN indicates that the Facility's industrial activities and associated materials are exposed to storm water, and that each of the substances listed on the EPA's Industrial Storm Water Fact Sheet is a potential source of pollutants at the Facility.

B. The Affected Receiving Waters

The Facility discharges into a municipal storm drain system, which then discharges to the Napa River, which flows to the San Pablo Bay and the San Francisco Bay ("Receiving Waters").

The San Francisco Bay is a water of the United States. The CWA requires that water bodies such as the San Francisco Bay meet water quality objectives that protect specific "beneficial uses." The Regional Water Board has issued the San Francisco Bay *Basin Water Quality Control Plan* ("Basin Plan") to delineate those water quality objectives.

The Basin Plan identifies the "Beneficial Uses" of water bodies in the region. The Beneficial Uses for the Receiving Waters downstream of the Facility include commercial and sport fishing, estuarine habitat, fish migration, navigation, preservation of rare and endangered species, water contact and noncontact recreation, shellfish harvesting, fish spawning, and wildlife habitat. Contaminated storm water from the Facility adversely affects the water quality of the San Francisco Bay watershed and threatens the beneficial uses and ecosystem of this watershed.

Furthermore, the San Francisco Bay is listed for water quality impairment on the most recent 303(d)-list for the following: chlordane; dichlorodiphenyltrichloroethane (DDT); dieldrin; dioxin compounds (including 2,3,7,8- tetrachlorodibenzo-pdioxin); furan compounds; invasive species; mercury; polychlorinated biphenyls (PCBs); PCBs (dioxin-like); selenium, and trash.

Polluted storm water and non-storm water discharges from industrial facilities, such as the Facility, contribute to the further degradation of already impaired surface waters, and harm aquatic dependent wildlife.

III. VIOLATIONS OF THE CLEAN WATER ACT AND GENERAL PERMIT

A. Operating Without NPDES Permit Coverage

The CWA prohibits storm water discharges without a permit. 33 U.S.C. § 1342; 40 C.F.R. § 122.26. The General Permit regulates operators of facilities subject to coverage under the National Pollutant Discharge Elimination System (NPDES) storm water permit, as these operators discharge storm water associated with specific industrial activities identified by both industrial activity and SIC (Standard Industrial Classification) codes in Attachment A of the Permit.

The Discharger's primary industrial activity is listed on Attachment A as an industrial activity subject to NPDES coverage. Thus, the facility was required to apply for coverage under the Permit in order to commence business operations, pursuant to Section I.Q of the Permit.

According to California Secretary of State records, Vincent Arroyo Winery, Inc. commenced its operations at the site on or about May 30, 1990.

Vincent Arroyo Winery, Inc. did not in fact apply for coverage under the 1997 or 2015 California Industrial General Permits. Thus, between at least May 30, 1990, and the present, the Facility has operated without NPDES Permit NOI coverage, which is applicable to the Facility. During that time, the Facility did not comply with any of the terms of the Permit, including implementing Best Management Practices, collecting and analyzing storm water runoff for pollution parameters, preparing and implementing a Storm Water Pollution Prevention Plan, or filing Annual Reports.

Permit noncompliance constitutes a violation of the Clean Water Act and the Water Code, is grounds for enforcement action against the Facility and is further a violation of Sections I and II.B.1.b. of the General Permit.

Section II.B.5 provides that “New Dischargers registering for NOI coverage on or after July 1, 2015 shall certify and submit PRDs via SMARTS at least seven (7) days prior to commencement of industrial activities or on July 1, 2015, whichever comes later.”

B. Fraudulent Application for NEC Coverage

Section XVII of the General Permit provides for No Exposure Certification Coverage (“NEC” coverage), which is a Conditional Exclusion to Dischargers who are able to certify that their facility has no exposure of industrial activities or materials to rain, snow, snowmelt and/or runoff; and that all unauthorized non storm water discharges (NSWDs”) have been eliminated and all authorized NSWDs meet the conditions of Section IV of the General Permit. If a Facility qualifies for NEC coverage, after submission of specific Permit Registration Documents to the Water Board and payment of the appropriate fees, the Facility is excluded from compliance with Section X (Developing and Implementing a SWPPP) or Section XI (Monitoring) of the General Permit.

In order to qualify for NEC coverage, all Industrial Materials and Industrial Activities at a facility must be protected by a Storm-Resistant Shelter; i.e., completely roofed and walled buildings or structures. Further, the facility must be inspected and evaluated annually to determine that storm water exposed to industrial materials or equipment has not and will not be discharged to waters of the United States. Evaluation records must maintained by the Facility for five years.

If that criteria applies, then the Facility is required to submit to SMARTS a completed NEC Application Form and Checklist, which includes the following, as well as a Site Map consistent with Section X.E of the General Permit which verifies that there is no exposure of industrial activities or materials to storm water at the site:

1. An NEC Checklist prepared by the Discharger demonstrating that the facility has been evaluated; and that none of the following industrial materials or activities are, or will be in the foreseeable future, exposed to precipitation:
 - a. Using, storing or cleaning industrial machinery or equipment, and areas where residuals from using, storing or cleaning industrial machinery or equipment remain and are exposed;
 - b. Materials or residuals on the ground or in storm water inlets from spills/leaks;
 - c. Materials or products from past industrial activity;
 - d. Material handling equipment (except adequately maintained vehicles);
 - e. Materials or products during loading/unloading or transporting activities;
 - f. Materials or products stored outdoors (except final products intended for outside use, e.g., new cars, where exposure to storm water does not result in the discharge of pollutants);

- g. Materials contained in open, deteriorated or leaking storage drums, barrels, tanks, and similar containers;
- h. Materials or products handled/stored on roads or railways owned or maintained by the Discharger;
- i. Waste material (except waste in covered, non-leaking containers, e.g., dumpsters);
- j. Application or disposal of processed wastewater (unless already covered by an NPDES permit); and,
- k. Particulate matter or visible deposits of residuals from roof stacks/vents evident in the storm water outflow.

2. Signature certifying the following:

*I certify **under penalty of law** that I have read and understand the eligibility requirements for claiming a condition of 'no exposure' and obtaining an exclusion from NPDES storm water permitting; and that there are no discharges of storm water contaminated by exposure to industrial activities or materials from the industrial facility identified in this document (except as allowed in subsection C above). I understand that I am obligated to submit a no exposure certification form annually to the State Water Board and, if requested, to the operator of the local Municipal Separate Storm Sewer System (MS4) into which this facility discharges (where applicable). I understand that I must allow the Water Board staff, or MS4 operator where the discharge is into the local MS4, to perform inspections to confirm the condition of no exposure and to make such inspection reports publicly available upon request. I understand that I must obtain coverage under an NPDES permit prior to any point source discharge of storm water from the facility. I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information submitted. Based upon my inquiry of the person or persons who manage the system, or those persons directly involved in gathering the information, the information submitted is to the best of my knowledge and belief true, accurate and complete. I am aware there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.*

Once the proper permit registration documents have been submitted and the requisite fees paid, the SMARTS database system **automatically approves the Facility for NEC coverage**. It is important to note that the Facility's NEC registration documents are not reviewed by Water Board staff and that a Facility is not technically "approved" for NEC coverage unless and until the Regional Water Board conducts an inspection of the Facility to verify that it qualifies for NEC coverage.

If circumstances change after a Facility applies for NEC coverage, or **if a Facility does not in fact qualify for NEC coverage when it registers on-line for same, the Discharger is subject to enforcement action for discharging without a permit. (See Section XVII.E.2)**

Further, the Regional Water Board may subsequently deny NEC coverage and require standard NOI coverage upon determining that storm water is exposed to Industrial Materials and Activities at the site, and/or the Facility's discharge has a reasonable potential to cause or contribute to an exceedance of an applicable water quality standard. (See Section XVII.E.3)

On August 28, 2019, Matthew Moyer, the owner of Vincent Arroyo Winery, submitted a No Exposure Certification application to SMARTS which included an alleged "Site Map." However, the Site Map, which was not prepared by an environmental professional, was simply nothing more than a Google Map printout of the Facility from an aerial/satellite view and does not in any way comport with the requirements for an NEC Certification Site Map.

EDEN's investigation has confirmed that the Facility in fact conducts industrial operations outdoors which are not fully contained in storm-resistant shelters, notwithstanding its certification in the NEC application that no industrial materials or operations are exposed to stormwater at the Facility.

Mr. Moyer's certification and submission of the NEC application to the State Water Board was false and fraudulent for the reasons stated above. Furthermore, EDEN contends that Ms. Feng's fraudulent statements made under penalty of perjury in the state of California, to register the Facility improperly for NEC coverage, were made for the sole purpose of attempting to avoid liability for its CWA and General Permit violations.

C. Failure to Implement a SWPPP and Site Map

The Discharger has not implemented a Storm Water Pollution Prevention Plan ("SWPPP") for the Facility which complies with the requirements of the General Permit as specified in Section X of Order No. 2014-0057-DWQ.

Failure to develop or implement an adequate SWPPP is a violation of Sections II.B.4.f and X of the General Permit.

D. Failure to Implement a Monitoring and Sampling Program

1. Failure to Conduct Visual Observations

Section XI(A) of the General Permit requires all Dischargers to conduct visual observations at least once each month, and sampling observations at the same time sampling occurs at a discharge location.

Observations must document the presence of any floating and suspended material, oil and grease, discolorations, turbidity, odor and the source of any pollutants. Dischargers must document and maintain records of observations, observation dates, locations observed, and responses taken to reduce or prevent pollutants in storm water discharges.

EDEN alleges that between July 1, 2015, and the present, the Discharger has failed to conduct monthly and sampling visual observations pursuant to Section XI(A) of the General Permit.

2. Failure to Collect and Analyze the Required Number of Storm Water Samples

In addition, EDEN alleges that the Discharger has failed to provide the Regional Water Board with the minimum number of annual documented results of facility run-off sampling as required under Sections XI.B.2 and XI.B.11.a of Order No. 2014-0057-DWQ, in violation of the General Permit and the CWA.

Section XI.B.2 of the General Permit requires that all Dischargers collect and analyze storm water samples from two Qualifying Storm Events (“QSEs”) within the first half of each reporting year (July 1 to December 31), and two (2) QSEs within the second half of each reporting year (January 1 to June 30).

Section XI.B.3 of the General Permit requires Dischargers who are members of Compliance Groups to collect and analyze storm water samples from one (1) QSE within the first half of each reporting year (July 1 to December 31) and one (1) QSE within the second half of the reporting year (January 1 to June 30).

Section XI.C.6.b provides that if samples are not collected pursuant to the General Permit, an explanation must be included in the Annual Report.

As of the date of this Notice, the Discharger has failed to upload into the SMARTS database system:

- a. Two storm water sample analyses for the time period July 1, 2015, through December 31, 2015;
- b. Two storm water sample analyses for the time period January 1, 2016, through June 30, 2016;
- c. Two storm water sample analyses for the time period July 1, 2016, through December 31, 2016;
- d. Two storm water sample analyses for the time period January 1, 2017, through June 30, 2017;

- e. Two storm water sample analyses for the time period July 1, 2017, through December 31, 2017;
- f. Two storm water sample analyses for the time period January 1, 2018, through June 30, 2018;
- g. Two storm water sample analyses for the time period July 1, 2018, through December 31, 2018; and
- h. Two storm water sample analyses for the time period January 1, 2019, through June 30, 2019.

E. Failure to File Annual Reports

Vincent Arroyo Winery, Inc. has failed to comply with Section XVI.A of the General Permit, which provides as follows: “The Discharger shall certify and submit via SMARTS an Annual Report no later than July 15th following each reporting year using the standardized format and checklists in SMARTS.”

Vincent Arroyo Winery, Inc.’s Annual Report for the reporting years 2015-16, 2016-17, 2017-18 and 2018-19 were due on or before July 15, of each reporting year. However, Vincent Arroyo Winery, Inc. has failed to file all Annual Reports as of the date of this Notice.

F. Deficient BMP Implementation

Sections I.C, V.A and X.C.1.b of the General Permit require Dischargers to identify and implement minimum and advanced Best Management Practices (“BMPs”) that comply with the Best Available Technology (“BAT”) and Best Conventional Pollutant Control Technology (“BCT”) requirements of the General Permit to reduce or prevent discharges of pollutants in their storm water discharge in a manner that reflects best industry practice, considering technological availability and economic practicability and achievability.

EDEN alleges that Vincent Arroyo Winery, Inc. has been conducting industrial activities at the site without adequate BMPs to prevent resulting non-storm water discharges. Non-storm water discharges resulting from these activities are not from sources that are listed among the authorized non-storm water discharges in the General Permit, and thus are always prohibited.

Vincent Arroyo Winery, Inc.'s failure to develop and/or implement adequate BMPs and pollution controls to meet BAT and BCT at the Facility violates and will continue to violate the CWA and the Industrial General Permit each day the Facility discharges storm water without meeting BAT and BCT.

G. Discharges in Violation of the General Permit

Except as authorized by Special Conditions of the General Permit, Discharge Prohibition III(B) prohibits permittees from discharging materials other than storm water (non-storm water discharges) either directly or indirectly to waters of the United States. Unauthorized non-storm water discharges must be either eliminated or permitted by a separate NPDES permit.

Information available to EDEN indicates that unauthorized non-storm water discharges occur at the Facility due to inadequate BMP development and/or implementation necessary to prevent these discharges.

EDEN alleges that the Discharger has discharged storm water containing excessive levels of pollutants from the Facility to its Receiving Waters during at least every significant local rain event over 0.1 inches in the last five (5) years.

EDEN hereby puts the Discharger on notice that each time the Facility discharges prohibited non-storm water in violation of Discharge Prohibition III.B of the General Permit is a separate and distinct violation of the General Permit and Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a).

Vincent Arroyo Winery, Inc. may have had other violations that can only be fully identified and documented once discovery and investigation have been completed. Hence, to the extent possible, EDEN includes such violations in this Notice and reserves the right to amend this Notice, if necessary, to include such further violations in future legal proceedings.

IV. THE PERSON OR PERSONS RESPONSIBLE FOR THE VIOLATIONS

The entities responsible for the alleged violations are Vincent Arroyo Winery, Inc., as well as Matthew and Adrian Moyer and employees of the Facility responsible for compliance with the CWA.

V. THE DATE, DATES, OR REASONABLE RANGE OF DATES OF THE VIOLATIONS

The range of dates covered by this 60-day Notice is from at least September 1, 2014, to the date of this Notice. EDEN may from time to time update this Notice to include all violations which may occur after the range of dates covered by this Notice. Some of the violations are continuous in nature; therefore, each day constitutes a violation.

VI. CONTACT INFORMATION

The entity giving this 60-day Notice is Eden Environmental Citizen's Group "EDEN").

EDEN has retained counsel in this matter:

Paul J. Warner
Paul Warner Law
P.O. Box 4755
Arcata, CA 95518
Telephone: (707) 825-7725
Email: pjwlaw@sbcglobal.net

To ensure proper response to this Notice, all communications should be addressed to EDEN's legal counsel, Mr. Paul Warner.

IV. RELIEF SOUGHT FOR VIOLATIONS OF THE CLEAN WATER ACT

CWA §§ 505(a)(1) and 505(f) provide for citizen enforcement actions against any "person," including individuals, corporations, or partnerships, for violations of NPDES permit requirements and for un-permitted discharges of pollutants. 33 U.S.C. §§ 1365(a)(1) and (f), §1362(5).

Pursuant to Section 309(d) of the Clean Water Act, 33 U.S.C. § 1319(d), and the Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. § 19.4, each separate violation of the Clean Water Act subjects the violator to a penalty for all violations occurring during the period commencing five (5) years prior to the date of the Notice Letter. **These provisions of law authorize civil penalties of \$37,500.00 per day per violation for all Clean Water Act violations after January 12, 2009, and \$51,570.00 per day per violation for violations that occurred after November 2, 2015.**

In addition to civil penalties, EDEN will seek injunctive relief preventing further violations of the Clean Water Act pursuant to Sections 505(a) and (d), 33 U.S.C. § 1365(a) and (d), declaratory relief, and such other relief as permitted by law.

Lastly, pursuant to Section 505(d) of the Clean Water Act, 33 U.S.C. § 1365(d) and California Code of Civil Procedure §1021.5, EDEN will seek to recover its pre and post-litigation costs, including all attorneys' and experts' fees and costs incurred (see *Southern California Alliance of Publicly Owned Treatment Works v. U.S. Environmental Protection Agency* (9th Cir. 2017) 853 F.3d 1076; *Vasquez v. State of California* (2008) 45 Cal.4th 243).

V. CONCLUSION

The CWA specifically provides a 60-day notice period to promote resolution of disputes. EDEN encourages Vincent Arroyo Winery, Inc.'s counsel to contact **EDEN's counsel** within 20 days of receipt of this Notice to initiate a discussion regarding the violations detailed herein. Please do not contact EDEN directly.

During the 60-day notice period, EDEN is willing to discuss effective remedies for the violations; however, if Vincent Arroyo Winery, Inc. wishes to pursue such discussions in the absence of litigation, it is suggested those discussions be initiated soon so that they may be completed before the end of the 60-day notice period. EDEN reserves the right to file a lawsuit if discussions are continuing when the notice period ends.

Very truly yours,



AIDEN SANCHEZ
Managing Member
Eden Environmental Citizen's Group
QISP #00998

Copies to:

Andrew Wheeler: wheeler.andrew@Epa.gov
Administrator, US Environmental Protection Agency

State Water Resources Control Board
Eileen Sobeck, Executive Director
eileen.sobeck@waterboards.ca.gov

Mayumi Okamoto, Office of Enforcement:
Mayumi.Okamoto@waterboards.ca.gov
stormwater@waterboards.ca.gov

Regional Administrator, U.S. EPA – Region 9
Jennifer Pierce: pierce.jennifer@epa.gov
Laurie Kermish: kermish.Laurie@epa.gov